

UGANDA / JUDGMENT

Mperwa v Uganda (Criminal Appeal No. 0629 of 2015) [2024] UGCA 349 (28 June 2024)

[2024] UGCA 349

COURT

Court of Appeal of Uganda

BEFORE

Buteera, DCJ, Obura, JA, Mulyagonja, JA

CASE / FILE NUMBER

Criminal Appeal No. 0629 of 2015

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASINDI

(Coram: Buteero DCJ, Oburo and Mulyogonjo JJA)

CRIMINAL APPEAL NO.0629 OF 2015

MPERWA ABDU APPELLANT

VERSUS

UGANDA RESPONDENT

(Appeal from the decision of the High Court of Uganda held at Hoimo before Hon. Mr. Justice Simon Byobokomo Mugenyi delivered on the 24th day of April, 2014 in Criminal Session Case No. 31 I of 2010)

JUDGMENT OF COURT

INTRODUCTION

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The appellont was indicted with one count of murder contrary to Sections IBB and I 89 and three counts of attempted murder contrary to Section 204 of the Penal Code Act (Cap 120).

He pleaded not guilty to the charges, went through a full trial after which he was found guilty on all the four counts. He was convicted and sentenced to 35 years' imprisonment on the count of murder and 10 years' imprisonment on each count of attempted murder. The sentences were to run concurrently.

BACKGROUND

The facts of the case as can be ascertained from the record are that on 20th August, 2010, the appellant who was a soldier in the Ugandan Peoples' Defence Forces (UPDF) attached to the 59th Battalion murdered Bedikemu at Mbegu Village, Buseruko Sub-county, Hoima District.

The appellant had given UGX 100,000/= to Ms. Atim in return for a love affair. The said Ms. Atim did not fall in love with the appellant and refused to refund the money the appellant had given her.

The appellant was disappointed and issued threats to Ms. Atim. The appellant proceeded to the army barracks from where he picked a gun but did not find Ms. Atim where he had left her. He shot at the persons he found at the place where he had left Ms. Atim. Four people were shot of and one died while three suffered injuries.

The appellant was tried and found guilty. He was sentenced to 35 years' imprisonment on the count of murder and 10 years' imprisonment on each of the counts of attempted murder and the sentences were to run concurrently.

Dissatisfied with the sentence the appellant appealed to this Court on one ground:

1. The learned trial Judge erred in law and fact when he passed a very harsh and excessive sentence of 35 years' imprisonment in the circumstances.

The respondent opposed the appeal.

REPRESENTATION

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At the hearing, the appellant Kosongoki. WC5 represented by Mr. Simon

The respondent was represented by Mr. Joseph Kyomuhendo (Chief State Attorney) holding brief for Ms. Immaculole Anguloko (Chief State Attorney) from the Office of the Director Public Prosecutions.

Counsel for the respective parties filed written submissions. They appeared in Court and were granted leave to adopt and rely on their written submissions.

APPELLANT'S SUBMISSIONS

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Counsel for the appellant submitted that as a first appellate Court this Court has a duty to reconsider all the material evidence that was adduced before the trial Court and come to its own conclusions on facts and law while making allowance for the fact that it neither saw nor heard the witnesses.

Counsel cited Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions which provides for the duty of the Court of Appeal in first appeals. The Court was also referred to the authorities of *Bogere & Anor vs. Uganda* (S. C. Cr. App No 1 of 1997) reported at [1998] KALR 1, *Bogomo Fred vs Uganda* (S. C. Cr. App No.7 of 2004), *Kifomunle Henry vs. Uganda*, (S. C. Cr. App No 10 of 1997) and *D. R Pondya vs R* fi9571EA 336 that illustrate the duty of a first appellate Court.

Counsel submitted that the sentence passed by the learned trial Judge was very harsh and manifestly excessive.

Counsel cited the authority of *Ogolo s/o Owouro Vs. Regino* (Criminal Appeal No. 175 of 1954) where the East African Court of Appeal held that an appellate Court does not alter a sentence on the mere ground that the members of the Court would have passed a somewhat different sentence unless it is evident that the Judge acted upon some wrong principle, overlooked some material factor or the sentence is manifestly excessive in view of the circumstances of the case.

Counsel referred to the mitigating factors raised by the appellant in *locutus* i.e. he was a first offender, had spent 3 years and 8 months

in pre-trial custody, was a young man aged 31 years, married with ⁴ children and had asked for forgiveness. That the trial Court should have considered these factors and exercised more leniency in determining the appellant's sentence.

Counsel cited authorities from the Supreme Court and this Court where the offence of murder had been considered.

In the case of *Godi vs. Uganda*. (S. C. Cr. App. No. 3 of 2005) the appellant shot his wife dead and was sentenced to 25 years' imprisonment.

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In *Simbwo Poul vs. Uganda*, (C. C. Cr. App No. 23 of 2012) the appellant participated in a mob that led to the death of the deceased. The appellant was sentenced to 13 years' imprisonment.

In *Tuhumwire Mory vs. Ugondo*, (C. A. Cr. App. No.352 of 2015) the appellants murdered the deceased by cutting them on the head and hands. A sentence of 25 years' imprisonment meted on the appellants by the trial Court was reduced to 10 years' imprisonment on appeal.

In *Uwero Nsengo vs Ugondo*, (Criminal Appeal No. 312 of 2013) the appellants killed her husband by running over him with a car of the gate of their home and was sentenced to 20 years' imprisonment.

Counsel prayed that this appeal be allowed and the appellants' sentence on the count of murder be reduced to 12 years' imprisonment.

Counsel further prayed that the sentence for murder runs concurrently with the sentences for attempted murder from the date of conviction and the period the appellants had spent on remand of 3 years and 8 months be taken into account in sentencing the appellants.

RESPONDENT'S SUBMISSIONS

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Counsel for the respondent raised preliminary objections challenging the competency of this appeal.

The first objection was that this appeal being against sentence only, the appellants should have sought leave of this Court pursuant to Section 132 (1)(b) of the Trial on Indictments Act which was not done.

Counsel submitted that the appellants were sentenced on 24th April, 2014 and were pursuant to Section 28 of the Criminal Procedure Code Act required to give notice of his intention to appeal within 14 days but the notice of appeal on the record of Court shows that it was lodged on 31st December, 2015. That the appellants need to seek leave to validate but the respondent does not have objection to such application.

Counsel submitted that an appellate Court only interferes with the sentence imposed by the trial Court where it is evident that the trial Court acted on a wrong principle or overlooked some material fact or if the sentence is manifestly harsh and excessive in view of the circumstances of the case.

The authorities of *Kiwolobye Benard vs. Ugondo*, (S. C. Cr. App. 143 of 2001) and *Koroso Moses Vs. Ugondo* (S. S. Sr. App. No. 23 of 2016) were cited in this regard.

Counsel cited the case of *Kyolimpo Edward vs. Ugondo*, (S. C. Cr. App. 10 of 1995) where it was held that an appropriate sentence is a matter of discretion of the trial Judge and that each case presents its own facts upon which a Judge exercises his discretion.

Counsel further cited the case of *Komyo Johnson Woyomuno vs. Ugondo*, (Criminal Appeal No. 16 of 2000) where Court held that on

appellate Court should not interfere with the exercise of discretion because the members of the Court would have exercised their discretion differently.

Counsel submitted that the learned trial Judge complied with the law having considered the period the appellant had spent on remand before sentencing him.

Counsel cited the case of *Kizifo Senkulo vs. Ugondo*, (Criminal Appeal No. 24 of 2001) where Court held that taking into account the period the appellant has spent on remand did not require an arithmetic deduction of the period a convict had spent in pre-trial custody. That the sentence was in compliance with the provisions of Article 23 (8) of the Constitution and the case law cited by counsel for the appellant in this respect was not applicable to this case.

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Counsel submitted that the sentence handed down to the appellant was within the range prescribed by law and is consistent with the sentences dispensed by this Honorable Court and the Supreme Court.

Counsel cited several authorities to justify the sentences handed down to the appellant.

In *Bokubye Muzomiru vs. Ugondo*, (S. C. Cr. App. No. 56 of 2015), a sentence of 40 years' imprisonment for murder was not considered harsh or excessive and the same was confirmed by the Supreme Court.

In *Sekowoyo Blossio vs. Ugondo*, (S. C. Cr. App. No. 24 of 2014) a sentence of life imprisonment on each of the three counts of murder was confirmed by the Supreme Court.

In *Sunday Gordon vs. Uganda*, (C. A. Cr. App. No. 103 of 2006) this Court found no reason to interfere with a life sentence for murder as it was neither illegal nor manifestly excessive.

In the cases of *Florence Abbo vs. Uganda*, (C. A. Cr. App. No. 168 of 2013) where a sentence of 40 years' imprisonment for murder was upheld by this Court, *Magero Patrick & Anor vs. Uganda*, (C. A. Cr. App. No. 76 of 2019) where a sentence of 45 years' imprisonment for murder was upheld by this Court and *Wani Alfred vs. Uganda*, C. A. Cr. App. No. 181 of 2018 where a sentence of 40 years' imprisonment for murder and attempted suicide were cited to justify the sentence imposed against the appellant by the trial Judge.

APPELLANT'S SUBMISSIONS IN REJOINDER

It was submitted for the appellant in rejoinder that this Court has jurisdiction to grant leave to an appellant to appeal against sentence only and or extend the time within which to lodge a Notice of Appeal and to validate the Notice of Appeal filed on record.

Counsel submitted that since the respondent has no objection to leave to extend time for lodgement of the Notice of Appeal and validation of the same, the Notice of the Appeal lodged by the appellant on 31st December, 2015 be validated.

Counsel reiterated his submission that the sentence handed down to the appellant by the trial Court was excessive in the circumstances of the case.

RESOLUTION BY THE COURT

We shall deal with the preliminary objections that were raised by counsel for the respondent first.

The first point of objection raised by counsel for the respondent is that the appellant's appeal seeks to challenge the sentence alone which would require leave of Court before the appeal is heard.

Section 132 (1)(b) of the Trial on Indictments Act (Cap 123) provides;

"Subject of this Section-

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(b) on accused person may, with leave of the Court of Appeal, appeal to the Court of Appeal against the sentence alone imposed by the High Court, other than a sentence fixed by law;"

The appellant raised one ground of appeal. The ground of appeal is presented as follows;

"The learned trial Judge erred in law and fact when he passed a very harsh and excessive sentence of 35 years' imprisonment in the circumstances."

This appeal challenges the sentence alone. The appellant in his submission in rejoinder sought the leave of Court to which the respondent, raised no objection. Leave is granted to the appellant to appeal against sentence alone.

The second preliminary objection raised by the respondent was that the appellant's Notice of Appeal was lodged out of the time stipulated by law.

Section 28 (1) of the Criminal Procedure Code Act (Cap 116) provides;

"Every appeal shall be commenced by a notice in writing which shall be signed by the appellant or an advocate on his or her behalf, and shall be lodged with the registrar within fourteen days of the date of judgment or order from which the appeal is preferred."

Section 28 (6) of the Trial on Indictments Act provides;

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"The oppellofe Court moy, for good couse shown, extend lhe periods menfioned in subsection (1) or (3)."

The obove provision of the low gives lhis Court Jurisdiction to extend the period within which o Notice of oppeol can be lodged.

The respondent indicoted that theywould not oppose the opplicotion for extension of time within which the oppellonl should hove lodged his Nciice of Appeol.

It is just to hove the Notice of Appeol lodged by the oppellonl filed on 31'r December,2015 volidoted ond the some is hereby volidoted.

We sholl proceed to consicler the merils of ll're cr1-rpeul.

Rule 30 (1)(o) of the Judicoture (Court of Appeol Rules) Directions gives this Court the power to reopproise the evidence ond drow inferences of f oct.

The scope within which this jurisdiclion is to be exercised hos been o subject of litigotion ond decisions hove been mocje on this subject in os for os criminol oppeols ore concerned.

In Kyolimpo Edward Vs. Ugondo. (Criminol Appeol No. I0 of 1995), it was held;

"An appropriate sentence is a matter of the discretion of the sentencing Judge. Each case presents its own fact upon which a Judge exercises his discretion. It is the practice that an appellate Court, this Court will not normally interfere with the discretion of the sentencing Judge unless the sentence is illegal or unless Court is satisfied that the sentence imposed by the trial Judge was manifestly so excessive as to amount to an injustice."

In the earlier case of Ogalo s/o Owoura Vs. R [1950]18 EACA 114, it was held:

"The principles upon which an appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they may have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in the James Vs. R [1950]18 EACA 114 it is evident that the Judge has acted upon some wrong principle, or overlooked some material factor. To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case."

The complaint by the appellant in this appeal is that the sentence meted unto him by the trial Judge is very harsh and excessive in the circumstances.

The maximum punishment for the offence of murder is provided for under Section 189 of the Penal Code Act (Cap 120). A person convicted of the offence of murder is liable to suffer death.

The Supreme Court and this Court have considered several appeals against sentences for the offence of murder.

In *Sunday Gordon vs. Uganda*, C. A. Cr. App. No. 103 of 2006) this Court found no reason to interfere with a life sentence on a charge of murder and found that the sentence was neither illegal nor manifestly excessive.

In *Sekowoyo Blosio vs. Uganda*, (S. C. Cr. App. No. 24 of 2014) a sentence of life imprisonment on each of the three counts of murder was confirmed by the Supreme Court.

In *Bokubye Mvzomiru vs. Uganda*, (S. C. Cr. App. No. 56 of 2015), a sentence of 40 years' imprisonment for murder was not considered harsh or excessive and the same was confirmed by the Supreme Court.

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In the case of *Godi vs. Appellant* shot his wife imprisoned. Uganda, (S. C. Cr. App. No. 3 of 2005) The dead and was sentenced to 25 years'

In *Uwero Nsengo vs Uganda*, (Criminal Appeal No. 312 of 2013) the appellant killed her husband by running over him with a car at the gate of their home and was sentenced to 20 years' imprisonment.

The Sentencing (Sentencing Guidelines for Courts of Judicature) (Practice) (Directions), 2013 in the Third Schedule Part I Item 1 provide for the sentencing for the offence of murder after looking into account the factors aggravating or mitigating the sentence in each case to be from 30 years' imprisonment to death.

We have taken into account the fact that the appellant was a first offender, showed remorsefulness for his actions and was a young man aged 31 years of the time he committed the offence and was married with four young children.

However, the appellant pre-meditated his actions when he walked from the scene of crime to the barracks and picked a gun which is a deadly weapon that he used in the commission of the offences with which he was charged and later convicted.

The appellant at the time of commission of the offence was a serving officer in the Uganda Peoples' Defence Forces. He used a weapon he was meant to use to protect people from harm to commit a heinous offence.

The Supreme Court had occasion to handle a case with similar facts in the case of *Ogwong J Alfred vs Uganda*, Criminal Appeal No. 311997i

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Ogwong J Alfred was an officer of the armed forces who had been at the scene of crime prior to the commission of the offence. He went back to his residence, picked a gun, returned to the scene of crime and shot at people indiscriminately. He killed 13 people and injured 14 others. He was convicted and sentenced to death by the High Court. Both the Court of Appeal and Supreme upheld the death sentence.

The fact that the appellant was a soldier employed to protect citizens was considered relevant by the Supreme Court.

The authorities of *Godi vs Ugondo*, *Simbwo Poul vs Ugondo*, *Tuhumwire Mory vs Uganda* and *Uwero Nsengo vs Ugondo* (Supra) cited by counsel for the appellant are distinguishable from the case at hand. None of the cases cited involved a member of the Armed Forces and the murder and injury of various persons.

The learned trial Judge did not sentence the appellant to the maximum sentence.

We do not find a sentence of 35 years in the circumstances illegal or out of range for the offence committed.

We find no reason to interfere with the sentence imposed by the learned trial Judge as the same was neither harsh nor excessive.

This appeal lacks merit and is dismissed.

The appellant shall continue to serve the sentence imposed by the learned trial Judge.

We so order.

DATED AT Kampala this day of

2024.

RICHARD BUTEERA DEPUTY CHIEF JUSTICE

HELLEN OBURA JUSTICE OF APPEAL

IRENE MULYAGON

JUSTICE OF APPEAL

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